Supreme Court, U.S.
FILED
JUN 22 2000
CLERK

(5)

No. 99-1240

IN THE

Supreme Court of the United States

October Term, 2000

UNIVERSITY OF ALABAMA BOARD OF TRUSTEES
Petitioner,

v.

GARRETT, ET AL
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF COALITION FOR LOCAL SOVEREIGNTY IN SUPPORT OF PETITIONER

Kenneth B. Clark*
COALITION FOR LOCAL SOVEREIGNTY
611 Pennsylvania Ave, SE # 169
Washington, DC 20003
(301) 579 - 6100

* *Counsel of Record*

3400

QUESTION PRESENTED

Does subsection 5 of the Fourteenth Amendment grant Congress power to override a State's immunity from suit in federal court, as guaranteed by the Eleventh Amendment?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. Dozens of precedents affirm there are no exceptions to State immunity 2

A. *Fitzpatrick v. Bitzer* created a 14th Amendment exception out of thin air 11

II. Two parts of the Constitution must both be given force unless they are irreconcilably contradictory 14

III. A state retains all of its sovereignty unless there is "specific and explicit cession" of that sovereignty 17

IV. In adopting the 14th Amendment Congress did not express an intention to abrogate the 11th Amendment 18

V. *Fitzpatrick* Doctrine Contradicts Fundamental principles of federalism 21

CONCLUSION 24

TABLE OF AUTHORITIES

	Page(s)
Alden v. Maine, 98-436 *(1999)*	2, 17, 23
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)	*18, 22-3*
Ceour d'Alene v. Idaho, 521 US 261 (1997)	15, 25
Chisholm v. Georgia, 2 Dall. 419 (1793)	17
Duhne v. New Jersey, 251 US 311 (1920)	8
Edelman v. Jordan, 415 US 651 (1974)	10, 22
Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973)	10, 18
Ex Parte Young, 209 U.S. 123 (1908)	3-7
Ex Parte State of Virginia, 100 US 339 (1879)	12
Great Northern Life v. Read, 322 US 47 (1944)	9-10
Hans v. Louisiana, 134 U.S. 504 (1890)	3
In re Ayers, 123 U.S. 443 (1887)	*passim*
In re New York, 256 U.S. 490 (1921)	8-9, 22
Kimmel v. Florida, 98-791 (1999)	2
Parden v. Terminal R Co., 377 US 184 (1964)	11-12
Principality of Monaco v. State of Mississippi, 292 U.S. 313 (1934)	9
Pennhurst v. *Halderman*, 465 US 89 (1984)	19
Pennoyer v. McConnaughy, 140 US 1 (1891)	7
Quern v. Jordan, 440 U.S. 332 (1979)	13, 20-1
Seminole Tribe v. Florida, 517 US 44 (1996)	2, 24
U S v. Cruikshank, 92 US 542 (1875)	14

INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state and local officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsel to the petitioner, and counsel to the respondent, have consented to the filing of this *amicus* brief. Consent letters are on file with the Clerk of the Court.

SUMMARY

For over a century this Court has consistently ruled that the States' immunity from prosecution in federal court, which is guaranteed by the Eleventh amendment, is absolute and contains no exceptions or dilutions. In dozens of precedents over that time, this Court has repeatedly – by both implicit and explicit statements – refused to rule that the Fourteenth amendment affected the States' sovereign immunity in any way. This Court has repeatedly ruled that a state officer can only be sued in federal court when such suit was legally a suit against an individual who happens to be a state officer, and not legally a suit against the State.

The 1976 ruling in *Fitzpatrick v. Bitzer*, that the States' Eleventh Amendment immunity can be nullified by Congress when enforcing provisions of the Fourteenth amendment, was a judicial novelty – indeed, *Fitzpatrick* itself acknowledges that the Court had never in the previous 108

---

[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

years of Fourteenth Amendment jurisprudence acknowledged such a doctrine. The *Fitzpatrick* doctrine is Constitutionally unsound, contradictory of dozens of precedents, contrary to fundamental principles of federalism, and runs afoul of this Court's recent reinvigoration of Eleventh Amendment immunity.

I. Dozens of precedents affirm there are no exceptions to State immunity

Since this Court in recent decisions (*Seminole Tribe v. Florida, Alden v. Maine, Kimmel v. Florida, et al*) has reinvigorated the States' Eleventh Amendment immunity from suit in federal court, we take it as an established fact that, at least in terms of the unamended Constitution, State immunity from prosecution in federal courts is absolute and unqualified.

Does the Fourteenth Amendment's subsection 5 which grants Congress "power to enforce, by appropriate legislation, the provisions of this article" include the power to expand the jurisdiction of Article 3 Courts, beyond that previously granted by the Constitution?

Let us, then, begin by examining Supreme Court rulings directly following the adoption of the Fourteenth amendment.

It is, of course, acknowledged by all, that one of the most important cases in Eleventh amendment interpretation was EX PARTE YOUNG, 209 U.S. 123 (1908), which ruled that State officers could be subjected to suit in federal court, *as individuals*, for attempting to enforce a State law deemed unconstitutional. We agree that "Ex parte Young was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing

a statute claimed to violate the Fourteenth Amendment (EDELMAN v. JORDAN, 415 U.S. 651 (1974)).

After reviewing numerous precedents in which state officers were sued in federal court, the *Young* opinion concluded that whenever such suits had been allowed it was because the suits were against such people in the their individual and private capacities and not as public agents. This is the same conclusion reached in a survey of the same cases in *Hans* which ruled that while there were cases of individual officers being sued that:

> In all these cases the effort was to show, and the court held, that the suits were not against the state or the United States, but against the individuals; conceding that, if they had been against either the state or the United States, they could not be maintained. *Hans v. Louisiana*, 134 U.S. 504.

Following *Hans* and the entire line of Eleventh Amendment cases, the *Young* decision concluded that:

> Although the case is one arising under the removal act, and does not involve the Eleventh Amendment, it nevertheless illustrates the question now before us, and reiterates the doctrine that **the state is not a party** to a suit simply because the state railroad commission is such party.

Again, the court specifically ruled that the case could proceed in federal court specifically because the state was *not* a party to the suit.

There is no doubt that federal courts can have cognizance of some suits involving individuals who happen to be state officers, or which claims arise from activities of

state employees on the job. A police officer who steals from an individual from out of state, could certainly be sued in federal court for damages, and he could not invoke immunity. Even an officer who murders a person on orders from the governor could be sued for wrongful death if the person killed were a citizen of another state. That principle is not in dispute, nor has ever been questioned. What the *Young* case ruled on was whether the suit against Young was one against him in his individual capacity or against the State. The Court, on this matter of fact, incorrectly ruled that it was one against him as an individual. The case did not, however, ever call into question that States enjoy absolute immunity from prosecution.

'Even more interestingly for the current discussion, the *Young* case involved possible violations of the Fourteenth Amendment, and the Court had some vary specific things to say about the relation of the Eleventh and Fourteenth amendments:

> The Eleventh Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another state or citizens or subjects of any foreign state. The Fourteenth Amendment provides that no state shall deprive any person of life, liberty, or property without due process of law, nor shall it deny to any person within its jurisdiction the equal protection of the laws. The case before the circuit court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter amendment. We think that whatever the rights of complainants may be, they are largely founded upon that Amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any

> way altered or limited the effect of the earlier Amendment. **We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant.**

Far from saying that the Fourteenth amendment in any way limited the Eleventh amendment, this Court ruled that "we may assume that each exists in full force"

The dissenting opinion of Justice Harlan also emphasizes the view of the entire Court that the Eleventh amendment "exists in full force." Justice Harlan notes that:

> The essential and only question now before us or that need be decided is whether an order by the Federal court which prevents the state from being represented in its own courts, by its chief law officer, upon an issue involving the constitutional validity of certain state enactments, does not make a suit against the state within the meaning of the Eleventh Amendment. If it be a suit of that kind, then, *it is conceded*, the circuit court was without jurisdiction to fine and imprison the petitioner, and he must be discharged, whatever our views may be as to the validity of those state enactments. This must necessarily be so unless the Amendment has less force and a more restricted meaning now than it had at the time of its adoption, and unless a suit against the attorney general of a state, in his official capacity, is not one against a state under the Eleventh Amendment when its determination depends upon a question of constitutional power or right under the Fourteenth Amendment.

Justice Harlan says that "it is conceded" that the Eleventh amendment exists in full force, as we noted just above. But then, Harlan adds a stronger position of his own declaring:

> *In my opinion the Eleventh Amendment has not been modified in the slightest degree as to its scope or meaning by the Fourteenth Amendment*, and a suit which, in its essence, is one against the state, remains one of that character and is forbidden even when brought to strike down a state statute alleged to be in violation of that clause of the Fourteenth Amendment, forbidding the deprivation by a state of life, liberty, or property without due process of law. If a suit be commenced in a state court, and involves a right secured by the Federal Constitution, the way is open under our incomparable judicial system to protect that right, first, by the judgment of the state court, and ultimately by the judgment of this court, upon writ of error. But such right cannot be protected by means of a suit which, at the outset, is, directly or in legal effect, one against the state whose action is alleged to be illegal. That mode of redress is absolutely forbidden by the Eleventh Amendment, and cannot be made legal by mere construction, or by any consideration of the consequences that may follow from the operation of the statute. Parties cannot, in any case, obtain redress by a suit against the state. *Such has been the uniform ruling in this court.*

While this is the dissenting opinion in this case, Justice Harlan's conclusion that "Such has been the uniform ruling of this court." is a statement of fact which cannot seriously be contested. Moreover, the dispute between Harlan and the majority, was *not* over the question of whether there were exceptions to Eleventh Amendment immunity –

everyone agreed that there were none. The disagreement was over a judgement of fact that this particular case constituted a suit against a State.

It should be emphasized that the Court's refusal to acknowledge Young's immunity was in no way based upon any appeal to the Fourteenth amendment, but was entirely based upon the claim that the suit against Young was *not* a suit against Minnesota.

Justice Harlan cites a dozen precedents to show that "Such has been the uniform ruling of this court." Space consideration here prevent us from citing all of these examples. We have already seen that *Hans* acknowledged no exceptions, similarly PENNOYER v. MCCONNAUGHY, 140 U.S. 1 (1891) makes clear that there are no exceptions to Eleventh Amendment immunity:

> It is well settled that no action can be maintained in any federal court by the citizens of one of the states against a state, without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that 'no state shall pass any law impairing the obligation of contracts.' *This immunity of a state from suit is absolute and unqualified*, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. . . . In re Ayers, 123 U.S. 443; State v. Jumel, 107 U.S. 711; Antoni v. Greenhow, 107 U.S. 769; Cunningham v. Railroad Co., 109 U.S. 446; Hagood v. Southern, 117 U.S. 52.

The statement that "immunity of a state from suit is absolute and unqualified" leaves no room for the suggestion that the Court in 1891 believed any exceptions existed to the

Eleventh Amendment– whether from the Fourteenth Amendment or anywhere else.

If this Court did not acknowledge any exceptions to Eleventh Amendment immunity, in *Young*, was there any point at which this Court did acknowledge any such exceptions from the Fourteenth amendment? A brief survey of some of the precedents throughout the Twentieth Century shows that prior to 1976, the Court never imagined any exceptions.

In 1920 this Court addressed the sovereign immunity question in DUHNE v. STATE OF NEW JERSEY, 251 U.S. 311, ruling:

> it has been long since settled that *the whole sum of the judicial power granted by the Constitution to the United States* does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent. *Hans v. Louisiana*, 134 U.S. 1; *North Carolina v. Temple*, 134 U.S. 22; *California v. Southern Pacific Co.*, 157 U.S. 229; *Fitts v. McGhee*, 172 U.S. 516, 524.

In 1920 this Court recognized no exceptions to Eleventh Amendment immunity.

The very next year in IN RE NEW YORK, 256 U.S. 490 (1921) this Court noted:

> That a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that *it has become established by repeated decisions of this court that* ***the entire judicial power granted by the Constitution*** *does not embrace authority to entertain a suit brought by*

> *private parties against a state without consent given*; not one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the amendment is but an exemplification. *Beers v. Arkansas*, 20 How. 527, 529; *Railroad Co. v. Tennessee*, 101 U.S. 337, 339; *Hans v. Louisiana*, 134 U.S. 1, 10-17; *North Carolina v. Temple*, 134 U.S. 22; *Fitts v. McGhee*, 172 U.S. 516; *Palmer v. Ohio*, 248 U.S. 32, 34; *Duhne v. New Jersey*, 251 U.S. 311.

In 1921 this Court recognized no exceptions to Eleventh Amendment immunity.

In 1934 in PRINCIPALITY OF MONACO v. STATE OF MISSISSIPPI, 292 U.S. 313 this Court ruled that:

> To suits against a State, without her consent, brought by citizens of another State or by citizens or subjects of a foreign State, *the Eleventh Amendment erected an absolute bar*. Superseding the decision in Chisholm v. Georgia, supra, the Amendment established in effective operation the principle asserted by Madison, Hamilton, and Marshall in expounding the Constitution and advocating its ratification. The 'entire judicial power granted by the Constitution' does not embrace authority to entertain such suits in the absence of the State's consent. Ex parte State of New York, No. 1, supra, page 497 of 256 U.S. 41 S.Ct. 588; Missouri v. Fiske, 290 U.S. 18, 25, 26 S., 54 S.Ct. 18.

In 1934 this Court said that *the Eleventh Amendment erected an absolute bar*" to suits, and clearly considered that no substantial change to Eleventh Amendment immunity had occurred between the ratification of the Eleventh Amendment and 1934.

Ten years later, this Court again affirmed that only actions against individuals could be allowed. The Court

noted in GREAT NORTHERN LIFE INS. CO. v. READ, 322 U.S. 47 (1944), that

> The right of petitioner to maintain this suit in a Federal court depends, first, upon whether the action is against an individual or against the State of Oklahoma. Secondly, if the action is determined to be against the state, the question arises as to whether or not the state has consented to suit against itself in the Federal court.

Even in the early 1970's when state immunity was under serious attack, sovereign immunity was still upheld, in cases such as *Missouri Public Health* and *Edelman*:

> Although the Eleventh Amendment is not literally applicable since petitioners who brought suit are citizens of Missouri, it is established that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. EMPLOYEES v. MISSOURI PUBLIC HEALTH DEPT., 411 U.S. 279 (1973)

> While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. Hans v. Louisiana, 134 U.S. 1 (1890); Duhne v. New Jersey, 251 U.S. 311 (1920); Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944); Parden v. Terminal R. Co., 377 U.S. 184 (1964); Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973). It is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. EDELMAN v. JORDAN, 415 U.S. 651

(1974)

Finally, it is worth citing *Parden*, because, although the *Parden* court was openly hostile to the doctrine of Eleventh Amendment immunity, it nevertheless acknowledged no exceptions.

> Recognition of the congressional power to render a State suable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State's own citizens by the Hans case, is here being overridden. *It remains the law that a State may not be sued by an individual without its consent.* Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act. PARDEN v. TERMINAL R. CO., 377 U.S. 184 (1964)

Even the discredited *Parden* case acknowledged no exceptions to Eleventh Amendment immunity: "It remains the law that a State may not be sued by an individual without its consent."

Despite repeated claims from opponents of federalism that this Courts recent rulings on state immunity was a work of judicial activism, it would, in fact, be hard to find a matter of legal interpretation which has been more clearly or more consistently upheld by this court than the doctrine of state immunity from prosecution in federal court.

A. Fitzpatrick v. Bitzer created a 14th Amendment exception out of thin air

Given the unbroken string of precedents involving Eleventh amendment immunity, from whence came the *Fitzpatrick* decision? *Fitzpatrick* cited three precedents for the novel

view that the Eleventh Amendment was somehow limited by the Fourteenth Amendment (*Ex parte Virginia*, *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *Mitchum v. Foster*, 407 U.S. 225, 238 -239 (1972)). Yet *Fitzpatrick* then acknowledges:

> It is true that *none* of these previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under 5 of the Fourteenth Amendment. But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana*, are necessarily limited by the enforcement provisions of 5 of the Fourteenth Amendment.

This is an explicit acknowledgment that the Fitzpatrick doctrine is new and originates in 1976. After more than a century, and with literally dozens of precedents to the contrary the Court suddenly in 1976 discovered that Eleventh Amendment immunity had been nullified by the Fourteenth Amendment.

Since *Fitzpatrick* acknowledges that the cases it cites as precedents did not involve the issue in dispute, it is perhaps unnecessary to make this case further. However, it may be useful to note just how weak a precedent these cases make. This Court in EX PARTE STATE OF VIRGINIA, 100 U.S. 339 (1879), ruled explicitly that the arrest of the state judge was not an interference in his duties as a state official:

> But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the State statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that the act of Congress is

> unconstitutional because it inflicts penalties upon State judges for their judicial action. It does no such thing.

Appeal to *Katzenback* appears even more misplaced. That case was about the power of Congress to appoint the Justice Department to oversee state elections, and had nothing to do with private suits against states, nor was the Eleventh amendment ever mentioned in *Katzenback*.

Fitzpatrick is such a weak precedent that even after *Fitzpatrick*, this Court has hesitated to apply its doctrine. In QUERN v. JORDAN, 440 U.S. 332 (1979), then Justice Rehnquist writing for the majority rejected the Fourteenth Amendment challenge to sovereign immunity, noting:

> In Pugh the Court held, over three dissents, that the State of Alabama could not be joined as a defendant without violating the Eleventh Amendment, even though the complaint was based on 42 U.S.C. 1983 and the claim was a violation of the Eighth and Fourteenth Amendments similar to that made in Hutto. The Court said:
>
> > "There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit. Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937)." 438 U.S., at 782.

Lacking, as it did any precedent for the action, and in fact, rejecting over a century of jurisprudence, there have been few times in history that the principle of *stare decisis* has been more flagrantly flouted than in *Fitzpatrick*.

The decision flouted not just *stare decisis*, but the most fundamental rules of legal interpretation. Two parts of the Constitution must both be given full effect unless they are clearly and irreconcilably contradictory.

As David Currie has written in a critique of *Fitzpatrick* this reasoning could just as well be applied to any part of the Constitution. Currie notes: "This reasoning is less than overwhelming. One might have thought that subsec. 5 [of the Fourteenth Amendment], like other 'plenary' grants of power, was subject to explicit and implicit constitutional limitations; one would hardly read it to empower Congress to authorize cruel and unusual punishment [for violators of the Fourteenth Amendment]."[2] In other words, if Congress now has power to overrule parts of the Constitution in order to protect constitutional rights which they claim to be protected by the Fourteenth Amendment, then they are able to proscribe cruel and unusual punishment or anything else they deem "appropriate" for such protection, even though otherwise explicitly prohibited by the Constitution.

In fact, such an interpretation is not without historical precedent. In *US v. CRUIKSHANK*, 92 U.S. 542 (1875), this Court noted that Congress had attempted to suspend the First, Second and Fifth Amendments to the Constitution under powers it claimed to possess from the Fourteenth Amendment. This Court, quite correctly ruled that whatever new powers Congress might claim under the reconstruction amendments, these powers could not be exercised in violation of explicit prohibitions found in other amendments.

II. Two parts of the Constitution must both be

---

[2]David Currie, *The Constitution in the Supreme Court* (Chicago: University of Chicago Press, 1990), 573.

given force unless they are irreconcilably contradictory

Any argument that the Fourteenth Amendment actually overrules the Eleventh, must be based upon the claim that the two amendments are inherently contradictory.

It is a fundamental rule of interpretation that we must give full effect to all parts of the Constitution unless one clause is clearly incompatible with and contradictory to another. The Twenty-first amendment for example says that "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." The Fourteenth Amendment contains no such provision. The Eleventh Amendment is quite explicit that "the Judicial power of the United States shall not be construed to extend to" suits against States. That statement is not contradictory of anything in the Fourteenth Amendment.

The fact that courts gave full force to both amendments for over 100 years is irrefutable evidence that the two amendments are not contradictory.

There is nothing incompatible with the Fourteenth Amendment prohibiting States from denying equal protection, and the Eleventh Amendment saying that if they do, it is not the role of the federal courts to make them.

As the plurality noted in *Ceour d'Alene v. Idaho* "It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case."

This point seems eminently clear from an analysis of the relation of Article 1 section 10 and the Eleventh Amendment. Article 1 section 10, of course, provides a list of things which States are prohibited from doing: passing a "bill of attainder, ex post facto law, or law abridging freedom of contract" and so forth. In 1798 the Eleventh Amendment is ratified, and sovereign immunity is unquestionably enshrined in the Constitution. Does the Eleventh Amendment overrule and supersede art 1 sec 10? Can a State now pass a bill of attainder confiscating the property of a citizen of another State?

No one has ever argued that the Eleventh Amendment overruled Art 1 sec 10. Even the most diehard apologist for State's rights would not make such an argument. The assertion is preposterous. Even the most alarmist of anti-federalists never imagined that Article 1 sec 10 could be used to nullify sovereign immunity. As Alden declared, "The [Eleventh] Amendment's language, furthermore, was directed toward Article III, the only constitutional provision believed to call state sovereign immunity into question."

If a State in 1800 had attempted to make a law prohibited by Article 1, section 10, then it would have been unconstitutional, but any potential foreign citizen affected still would not have been able to bring suit against the State in federal court. He would need to bring suit in state court and demand that state judges rule the edict as a violation of the Constitution. It is entirely reasonable (and indeed our federal system was long built on the assumption) that some rights granted by the federal constitution are binding on a State, but that it is the responsibility of state courts – not federal ones – to guarantee it.

In *Couer d'Alene* the plurality opinion declared that "Neither in theory or in practice has it been shown

problematic to have federal claims resolved in State courts where Eleventh Amendment immunity would be applicable. . . Federal courts, after all, did not have general federal question jurisdiction until 1875." This position is echoed by the writing of Justice Harlan in *Young* that "If a suit be commenced in a state court, and involves a right secured by the Federal Constitution, the way is open under our incomparable judicial system to protect that right, first, by the judgment of the state court, and ultimately by the judgment of this court, upon writ of error."

If there is no necessary contradiction between Article 1 sec 10 and the Eleventh Amendment, as everyone will acknowledge. then there is also **no** reason to assume that there is a contradiction between the Eleventh and the Fourteenth Amendments. If there is no explicit contradiction then both parts must be given full force.

III. A state retains all of its sovereignty unless there is "specific and explicit cession" of that sovereignty.

Chisholm noted that "A state retains all of its sovereignty unless there is specific and explicit cession of that sovereignty." Certainly there is no "specific and explicit cession" of sovereign immunity found in the Fourteenth Amendment. Any attempt to find one is by implication or drawing on various "penumbras and emanations," but it is certainly not explicit.

We may also cite *Alden* (citing *Blatchford*) which postulated that "Congress may subject the States to private suits in their own courts only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." By this standard there is no "compelling evidence" to suggest that the Framers of the Fourteenth Amendment meant to overrule the Eleventh amendment. Rather, precedents established by the Court show that **"each exists in full force** " (Young).

Moreover, even if one accepts that the Fourteenth

Amendment was designed to effect a "fundamental shift" in State/federal relations, the exact nature of that shift is still open to much debate. The assertion that denial of sovereign immunity was part of that shift is again based on nothing more than assumption and implication. To utterly nullify an entire article of the Constitution based on mere implication should not happen.

The Eleventh Amendment is "specific and explicit' about what the federal courts may not do. To overrule a specific and explicit prohibition by appeal to a mere guess and implication is contrary to every rule of legal interpretation. It is as if Congress were to enact a provision violating the explicit provisions of one part of the Constitution, while appealing to its "implied powers" as authority to do so. It would be the height of absurdity to imagine that Congress could set aside specific and explicit prohibitions based on an appeal to any "implied powers," yet this is precisely what people do who argue that Congress may ignore the explicit prohibition in Amendment 11, based on an 'implied power" found in Amendment 14.

To this effect we cite no less an authority on the subject than Alexander Hamilton, who in discussing sovereign immunity in Federalist 81, declared that "to ascribe to the federal courts, by mere implication, and in destruction of preexting right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarranted."

Since the view that Congress may subject States to suit under the Fourteenth amendment is "a mere implication" drawn from that article, it clearly runs afoul of the standard set by Hamilton, and the standards set down by this Court in *Chisholom*, *Batchford* and elsewhere.

IV. ADOPTING THE FOURTEENTH AMENDMENT CONGRESS DID NOT EXPRESS AN INTENTION TO ABROGATE THE ELEVENTH AMENDMENT.

In recent cases, this Court has ruled that "Congress

must express its intention to abrogate the Eleventh Amendment in unmistakable language" (ATASCADERO STATE HOSPITAL v. SCANLON, 473 U.S. 234 (1985)). While there are problems with this doctrine[3] it at least seems logical to apply this same standard to the Fourteenth Amendment itself. Does the Fourteenth Amendment contain "an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States?'" (Pennhurst II, 465 U.S., at 99). We believe the answer to this question is clearly negative.

It is notoriously difficult to determine any legislative intent of the framers of the Fourteenth Amendment for the simple reason that there was no agreement even on such basic questions as who was a citizen. As Alfred Kelly has written of the Fourteenth Amendment debates, "Political strategy called for ambiguity, not clarity."[4] David Currie has noted that there were at least four different schools of thought on the meaning of the Amendment among its supporters (Op. Cit., 345). Despite this ambiguity, we must concur with the opinion of the Conference of Chief Justices who have written,

---

[3] This doctrine stems from *Employees v. Missouri Health Dept* 411 US 279 (1973) which did not say that Congress could overrule Eleventh Amendment immunity so long as it explicitly said so (which is how it is often interpreted); but simply said no one can claim for Congress a power which Congress itself has not claimed: "It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution."

[4] David Kelly, "Fourteenth Amendment Reconsidered," Michigan Law review, 54.8 (1956).

"We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy making powers which it now exercises."[5]

In so far as the sovereign immunity issue was raised at all it was raised by opponents of the Fourteenth Amendment who argued that the wording went too far and would be used to attack state immunity. This interpretation, however, seems to have been rejected by Rep. Bingham (one of the principle authors) who argued that the amendment "takes from no State any right that ever pertained to it" (Cong. Globe, 39th Cong., 1st Sess. 2542-3). It was the opponents of the amendment who argued that it would radically alter the federal-state balance of power, and the supporters who argued that it would not.

The view that the Fourteenth Amendment was not a radical change in the constitutional set-up was not only shared by this Court at the time and for many years following, but was also followed by other authoritative interpretations at the time. For example, the Indiana Supreme Court when asked to rule on the effect of the Fourteenth Amendment immediately following its "ratification" ruled that "The Fourteenth Amendment contains no new grant of power from the people, who are the inherent possessors of all power, to the federal government, nor diminish those of the states" (The State v. Gibson, 36 Ind. 389) This was the common agreement of state supreme courts in the 1870's.[6]

---

[5] Conference of Chief Justices, "Report of the Committee of Federal-State Relationships as Affected by Judicial Decisions," August 1958.

[6] See *We the States*, Virginia Commission on Constitutional Government, 1964.

Finally, even if the Fourteenth amendment was intended to significantly change the relationship of the state and federal governments, there is no reason to suppose that part of his change involved overruling the Eleventh amendment. As Justice Rehnquist has written most recently in this Court's opinion in *Quern v. Jordan*:

> There is no question that both the supporters and opponents of the Civil Rights Act of 1871 believed that the Act ceded to the Federal Government many important powers that previously had been considered to be within the exclusive province of the individual States. Many of the remarks from the legislative history of the Act quoted in MR. JUSTICE BRENNAN's opinion amply demonstrate this point. But neither logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compels, or even warrants, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States. . . . Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42d Congress believed that 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. Instead, 1 passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting 1. We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of 1.

While these words are explicitly about the Civil Rights Act of 1871, they apply equally well to the Fourteenth Amendment itself. No one can seriously maintain that if Congress had intended to override the Eleventh Amendment in passing the Fourteenth amendment a few years earlier, that the radical

Republicans would not have invoked that power in passing the Act of 1871.

We could paraphrase *Employees v. Missouri Health Dept* and conclude: It is not easy to infer that Congress in passing the Fourteenth Amendment, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution.

V. Fitzpatrick Doctrine Contradicts Fundamental principles of federalism

The *Fitzpatrick* exception to state immunity is particularly disturbing, because the Eleventh Amendment is not a discreet and unrelated part of the Constitution, it is rather, part of the fundamental fabric of federalism. "That a state may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the amendment is but an exemplification (IN RE NEW YORK, 256 U.S. 490 (1921)).

Moreover, as *Edelman* noted the queston of state immunity was one of the most central questions of the ratification debates:

> The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and *it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted.* (C. Warren, The Supreme Court in United States History 91) EDELMAN v. JORDAN, 415 U.S. 651 (1974).

This Court has repeatedly noted the importance of the doctrine of sovereign immunity, such as in ATASCADERO where this Court noted that:

> The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties." By guaranteeing the sovereign immunity of the States against suit in federal court, the Eleventh Amendment serves to maintain this balance

And as this Court recently noted in Alden v Maine:

> 'The principle of immunity from litigation assures the States and the nation from unanticipated intervention in the processes of government. " (Great Northern Life Ins. Co v. Read) When the States' immunity from private suits is disregarded, "'the course of their public policy and the administration of their public affairs" may become "'subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." (In re Ayers) While the States have relinquished their immunity from suit in some special contexts--at least as a practical matter--this surrender carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States. ... If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

In fact, statements by this Court as to the importance of state immunity in maintaining the independence of local government could well fill a book. Nowhere, perhaps, has the importance of this doctrine been more eloquently and forcefully set down than by Justice Harlan in his dissent against *Young* when he wrote that the denial of sovereign immunity

> if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the national and state governments. It would enable the subordinate Federal courts to supervise and control the official action of the states as if they were 'dependencies' or provinces. It would place the states of the Union in a condition of inferiority never dreamed of when the Constitution was adopted or when the Eleventh Amendment was made a part of the supreme law of the land.

CONCLUSION

In closing we cite this Court's decision in *Seminole Tribe of Florida v. Florida*, where Chief Justice Rehnquist wrote for the majority:

> [I]n the five years since it was decided, Union Gas has proven to be a solitary departure from established law. Reconsidering that decision, none of the policies underlying *stare decisis* require this Court's continuing adherence to its holding. The decision has been of questionable precedential value, largely because a majority of the Court expressly disagreed with the plurality's rationale. Moreover, the deeply fractured decision has created confusion among the lower courts that have sought to understand and apply it. The

> plurality's rationale also deviated sharply from this Court's established federalism jurisprudence and essentially eviscerated the Court's decision in Hans, since the plurality's conclusion - that Congress could under Article I expand the scope of the federal courts' Article III jurisdiction - contradicted the fundamental notion that Article III sets forth the exclusive catalog of permissible federal-court jurisdiction. Thus, Union Gas was wrongly decided and is overruled. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

In the last several years, this Court has seen fit to overrule both *Union Gas* and *Parden* (*Parden* being a precedent much older than *Fitzpatrick*). This Court has found that both of those decisions were mere blips in an otherwise constant jurisprudence of upholding Eleventh Amendment immunity by this Court. The reasoning found in *Seminole Tribe* can just as accurately be applied to *Fitzpatrick*. The *Fitzpatrick* exception – and the rejection of the Art 3 requirement that in cases "in which a state shall be a party the Supreme Court shall have original jurisdiction" – has opened the door for local governments to be micromanaged by 1000 federal court judges, each claiming superiority over the entire people of the state.

As Justice Harlan wrote in his dissent in *Young*:

> If a suit be commenced in a state court, and involves a right secured by the Federal Constitution, the way is open under our incomparable judicial system to protect that right, first, by the judgment of the state court, and ultimately by the judgment of this court, upon writ of error.

And as Justice Kennedy wrote in the plurality opinion in *Coeur d'Alene*:

> It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case.

It is time for a return to normalcy in this Court's Eleventh Amendment Jurisprudence. *Fitzpatrick* is a hold over from an activist period of this Court when the majority seemed to believe that local government could not be trusted with any independence and therefore had to be constantly monitored and controlled by unelected judges. That view is wrong and has been repudiated by the American people and by this Court in its recent decisions. There is now no reason to continue to adhere to the flawed and insupportable decision in *Fitzpatrick*. This Court should take the opportunity in the current case to explicitly overrule it.

Respectfully Submitted,
Kenneth B. Clark, *Counsel of Record*
Coalition for Local Sovereignty
611 Pennsylvania Ave, SE #169
Washington, DC 20003
(301) 579 6100

June 20, 2000

Appendix

Supreme Court Application of Fitzpatrick

A search in Findlaw resulted in the identification of a total of 32 Supreme Court cases which have cited Fitzpatrick v. Bitzer. A survey of these cases shows definitively that the Fitzpatrick doctrine (that Congress may abrogate the Eleventh Amendment immunity of the states under subsection 5 of the Fourteenth Amendment) has never been invoked in any other case. **Every time** which a plaintiff has argued that a State could be sued under a Fourteenth Amendment exception, the Court has ruled either that the issue involved was not covered by the Fourteenth Amendment, or that Congress had not made explicit provision for such a suit in the particular case.

Each of the 32 cases citing Fitzpatrick is summarized below.

1. Hutto v. Finney, 437 US 678 (1978): Issue: Attorney's Fees; Court ruled court awards of Attorney's fees was not barred by 11th Amendment because attorney's fees do "not compensate the plaintiff for injuries" and hence to do constitute a "suit against a State."

2. Maher v. Gagne, 448 US 122 (1980): Attorney's Fees.

3. Missouri v. Jenkins, 491 US 274 (1989): Issue: Attorney's Fees; Court rules "we also made clear [in Hutto and Maher] that the application of 1988 to the States did **not** depend on Congressional abrogation of States' immunity."

4. National League of Cities v. Usury, 426 US 833 (1976): Issue: Application of Federal Labor Standards Act (FLSA) to local governments; Court sided with cities, ruled cities not subject to FLSA.

5. Milliken v. Bradley, 433 US 267 (1977): Issue: school

desegregation; Court ruled that court order requiring school district to desegregate was not an Eleventh Amendment issue because it only required states to spend money which was already required by equal protection clause.

6. Monell v. New York City, 436 US 658 (1978): Issue: Suits against Local government: Court ruled local government protected from suit.

7. Quern v. Jordan, 440 US 332 (1979): Issue: Fourteenth Amendment; Court upheld state immunity in Fourteenth Amendment case ruling Congress did not make explicit intent to abrogate immunity.

8. New York Transit Authority v. Beazer, 440 US 568 (1979): Issue: suit against Local government; Court sided with city.

9. City of Rome v. US, 446 US 156 (1980): Issue: Federal Approval of voting districts; Eleventh amendment not an issue, private party not involved.

10. New York Gaslight Club v. Carey, 447 US 54 (1980) Issue: Suit between private parties, Immunity not at issue.

11. Owen v. City of Independence, 445 US 622 (1980): Issue: Ex parte Young type of suit against city.

12. Fullilove v. Klutznick, 448 US 448 (1980): Issue: Upheld federal statute requiring 10% of federal grant money to be used for minority business. Court ruled was a spending discretion case not Eleventh Amendment case.

13. Florida Dept of Health v. Florida Nursing Home, 450 US 147 (1981); Issue: Suit against State; Court reversed lower court ruling and refused to permit suit against Florida.

14. Pennhurst State School v. Halderman (Pennhurst 1) 451 US 1 (1981); Issue: Fourteenth Amendment: Court reversed lower court ruling and refused to permit suit against state by mentally retarded under Fourteenth Amendment.

15. Hodel v. Virginia Mining Association, 452 US 264 (1981); Issue: Court sided with State and struck down Surface Mining Control Act.

16. Patsy v. Florida Board of Regents, 457 US 496 (1982): Issue: Whether state remedies must be exhausted before filing suit in federal Court; Eleventh Amendment not at issue.

17. Florida Dept of State v. Treasure Salvors, 458 US 670 (1982): Interstate property dispute; Eleventh Amendment not at issue.

18. Hensley v. Eckerhart, 461 US 424 (1983): Issue: Suit against State: Court sided with Missouri.

19. EEOC v. Wyoming, 501 US 722 (1991): Issue: Commerce Clause regulation of States.

20. Pennhurst State School v. Halderman (Pennhurst 2), 465 US 89 (1984): Issue: Court ruled in favor of State found that suit prohibited by Eleventh Amendment.

21. Atascadero State Hospital v. Scanlon, 473 US 234 (1985): Fourteenth Amendment case: Court ruled States could not be sued under Civil Rights Act of 1964 since Congress had not expresses clear intent to abrogate sovereign immunity.

22. Welch v. Texas Highways Dept., 483 US 468 (1987): Issue: Court upheld State immunity from prosecution by employee.

23. Pennsylvania v. Union Gas, 491 US 1 (1989); Issue: Suits against States based on Commerce clause; overturned..

24. Will v. Michigan State Police, 491 US 58 (1989): Issue: Court sided with State ruled State could not be sued under statute invoked.

25. Delmuth v. Muth, 491 US 223, (1989); Issue: suits against states; Court ruled suits against states not permitted by Education of Handicapped Act, due to state immunity.

26. Blatchford v. Native Village of Noatak, 501 US 775 (1991); Issue suit against tribal government; Court reversed lower court ruling and refused to permit suit against village.

27. Gregory v. Ashcroft 501 US 452 (1991): Issue: Age Discrimination; Court sided with States.

28. Coleman v. Thompson, 501 US 722 (1991): Issue: Court sided with state and refused to permit suit, but 11th Amendment not at issue.

29. Hess v. Port Authority Trans Hudson Corp, (1994) Issue: Court Ruled Port Authority was a private corporation and not a division of any state even though seed money provided by New York and New Jersey.

30. Seminole Tribe v. Florida (1996): Court overturned earlier decision allowing Congress to abrogate State immunity under interstate commerce.

31. Idaho v. Coeur d'Alene Tribe (1997): Issue: Fourteenth Amendment; Court sided with state refused to permit suit.

32. City of Boerne v. Flores (1997): Issue: Rel. Freedom Rest. Act: Court sided with city, struck down RFRA.